FILE COPY

Office Supreme Court, U.S.
FILED
JUN 27 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 85

THE RICHMAN BROTHERS COMPANY,
Petitioner,

v.

AMALGAMATED CLOTHING WORKERS OF AMERICA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENTS IN OPPOSITION

WILLIAM J. ISAACSON,
67 Wall Street,
New York 5, New York,
Counsel for Respondents.

SMOOT & REIMER,
THURLOW SMOOT,
2141 Illuminating Building,
Cleveland 13, Ohio,
Of Counsel.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statute Involved	3
Statement	3
Argument	8
Conclusion	12

CITATIONS

Cases:

Amalgamated Clothing Workers of America v. *Richman Bros. Co.*, 348 U. S. 511 5

Capital Service, Inc., 100 N. L. R. B. 1092 (1952) 10

Curtis Bros., Inc., 119 N. L. R. B. 232, set aside — F. 2d — (C. A. D. C. 1958) [43 L. R. R. M. 2156], cert. granted, *sub nom. National Labor Relations Board* v. *Drivers, Chauffeurs, Helpers Local Union No. 639, etc.*, 79 S. Ct. 876 ..... 10, 10n

Garner v. *Teamsters Union*, 346 U. S. 485 (1953) 6, 8, 9, 9n, 10, 11

Hotel Employees Union, Local No. 255 v. *Sax Enterprises*, 3 L. Ed. 2d 289, 79 S. Ct. 273 ..... 7, 8, 10

PAGE

Richman v. *Amalgamated Clothing Workers*, 168 O. S. 560 (1959) 2

Richman Bros. Co. v. *Amalgamated Clothing Wkrs.*, 114 F. Supp. 185, rehearing denied, 116 F. Supp. 800 4

Richman Bros. Co. v. *Clothing Workers*, 51 Ohio Opinions 145 (1954) 5, 6

Richman Bros. Co. v. *Clothing Workers*, 57 Ohio Opinions 487 6

Richman Bros. Co. v. *Clothing Workers*, 101 Ohio App. 459, 131 N. E. (2d) 662, affirmed 168 O. S. Ex. 563 ..... 6, 7, 8

Richman Bros. Co. v. *Union*, 104 Ohio App. 142, 144 N. E. 2d 573 (1957) 2

San Diego Building Trades Council, etc. v. *Garmon*, 79 S. Ct. 773 ..... 8, 9, 10, 11

Weber v. *Anheuser-Busch, Inc.*, 348 U. S. 468 .. 8, 9

Statutes:

National Labor Relations Act as amended, 29 U. S. C. Section 141, *et seq.* 3, 8, 10, 11

Section 7 (29 U. S. C. Section 157) .. 2, 3

Section 8 (29 U. S. C. Section 158) 2, 3, 10, 10n

Judicial Code, Section 2283 (28 U. S. C. 2283) .. 5

Miscellaneous:

93 Cong. Rec. A3370 (1947) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 965

THE RICHMAN BROTHERS COMPANY,
Petitioner,

v.

AMALGAMATED CLOTHING WORKERS OF AMERICA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, the Amalgamated Clothing Workers of America, the Amalgamated's Cleveland Joint Board, a regional grouping of constituent locals of the parent group, and individual members and employees of said unions, hereinafter collectively referred to as "Amalgamated" oppose the petition of The Richman Brothers Company, hereinafter referred to as "Richman", for a writ of certiorari to review the judgment of the Supreme Court of Ohio entered in the above entitled case on March 4th, 1959 (168 O. S. 560).

Although Richman's petition for certiorari purports to set forth the question presented (Pet., pp. 6-7), it does not accurately do so. The question presented, properly restated, is as hereinafter set forth.

Opinions Below

The opinion of the Eighth District Court of Appeals of Ohio, reported in *Richman Bros. Co.* v. *Union*, 104 Ohio App. 112, 144 N. E. 2d 573 (1957) is printed in Appendix B of the Petition for Certiorari. The opinion of the Supreme Court of Ohio, reported in *Richman* v. *Amalgamated Clothing Workers*, 168 O. S. 560 (1959), is also printed in Appendix B of the Petition for Certiorari.

Jurisdiction

To the extent that the facts set forth in the petition for certiorari in support of jurisdiction do not adequately summarize or reflect the proceedings below, supplementation is hereinafter made in the Statement.

Question Presented

Whether peaceful picketing by a union for the purpose, as alleged by petitioner herein and found by each of the courts below, of causing the employer to force its employees to become members of the union so that the union, irrespective of the majority's desires, may become the collective bargaining representative, is arguably an unfair labor practice under Section 8 or a protected activity under Section 7 of the National Labor Relations Act and therefore outside the authority of a state court to regulate or enjoin.

Statute Involved

The statutory provisions involved are certain provisions of the National Labor Relations Act, as amended, 29 U. S. C. Sec. 141, *et seq.*, more particularly Sections 157 and 158, portions of which sections are printed in the petition for certiorari as Appendix A.

Statement

The summary of the proceedings and opinions below at pages 2-6 of Richman's petition and the statement contained at pages 7-10 thereof fail to set forth in sufficient detail either the holdings of the courts below or the facts giving rise to the litigation. Accordingly, in order that this Court may have an adequate statement as well as an adequate summary of the proceedings and opinions below, the following supplementary statement is submitted.

The instant case arose out of Amalgamated's attempt to organize Richman's manufacturing employees employed at its factories in Cleveland, Ohio and Sturgis, Kentucky. As part of this campaign, Amalgamated, beginning in 1951, sought to inform the consuming public of the fact that Richman's products were non-union. For this purpose, Amalgamated utilized the media of press, radio, meetings, sound trucks and leaflets and also peacefully picketed Richman's retail outlets with signs bearing the legend that "Richman Bros. Clothes are not union made" (R. 8).[1]

[1] Record references are to the record certified by the Supreme Court of Ohio.

In October 1952, Richman instituted its action in the Ohio Court of Common Pleas for Cuyahoga County seeking an injunction restraining Amalgamated from picketing Richman's retail outlets in Ohio and in all of the other states in which its retail stores were located (R. 3-12). The gist of Richman's petition was that Amalgamated was "engaged, in carrying forward a conspiracy to cause economic pressure to be directed against plaintiff with the intention and for the purpose and objective of thereby causing plaintiff to force sufficient of its eligible employees to become members of defendant Amalgamated, so that defendant Amalgamated may become the representative of its such employees for the purpose of collective bargaining with plaintiff, regardless of the desires of a majority thereof" (R. 7). In addition, Richman complained that from "time to time" Amalgamated engaged in "special sporadic picketing demonstrations" in front of the retail outlets (R. 9). The petition was limited solely to a request for injunctive relief (R. 11-12).

Amalgamated removed Richman's suit to the District Court for the Northern District of Ohio on the ground that Richman's state court action was in reality a controversy arising under the National Labor Relations Act as amended. The case was remanded on the ground that, even were it assumed that Richman's petition alleged an unfair labor practice within the meaning of the National Labor Relations Act, such a charge was outside the original jurisdiction of the District Court. *Richman Bros. Co. v. Amalgamated Clothing Wkrs.*, 114 F. Supp. 185, rehearing denied, 116 F. Supp. 800. Amalgamated's subsequent motion in the state court to dismiss Rich-

man's action on the ground that it was within the exclusive purview of the National Labor Relations Board was denied. Thereupon, Amalgamated initiated proceedings in the Federal District Court seeking to enjoin further prosecution of the state court action on the ground that Richman's petition complained of matters wholly within the exclusive jurisdiction of the National Labor Relations Board. This Court, before whom the matter was ultimately presented, concluded that a federal district court was prohibited from granting the requested injunctive relief by virtue of the provisions of Section 2283 of the Judicial Code (28 U. S. C. 2283). *Amalgamated Clothing Workers of America* v. *Richman Bros. Co.*, 348 U. S. 511. Three of the Justices concluded that Section 2283 did not impose such a restraint. Although the members of this Court differed concerning the extent of the statutory restraint upon federal district courts, both the majority opinion (348 U. S. at 512 and 514) and the dissenting opinions (348 U. S. at 524 and 348 U. S. at 524-525) assumed that the controversy here in issue was within the exclusive purview of the National Labor Relations Board and therefore the state court was without authority.

Concurrently with the commencement of Amalgamated's aforesaid suit in the Federal District Court, the Ohio Court of Common Pleas proceeded to hear and grant Richman's motion for a temporary restraining order on the ground that Amalgamated was picketing for "the unlawful purpose of forcing an employer to force that unionization of its help which for years that same help has refused at the behest of the Amalgamated" *Richman Bros. Co.* v. *Clothing Workers*, 51 Ohio Opinions 145 (1954).

In June, 1955, after issuance of this Court's decision in the aforesaid *Richman* case, the temporary injunction was dissolved and Richman's petition dismissed in the Court of Common Pleas (57 Ohio Opinions 487), on the authority of *Garner* v. *Teamsters Union*, 346 U. S. 485 (1953). Thereafter, however, the intermediate appellate court, the Eighth District Court of Appeals, holding that the "special sporadic picketing demonstrations" referred to in Richman's petition "can not be equated with peaceful picketing but must be construed as mass picketing" and, as such, "suggest[ed] an area for the exercise of state authority under Ohio law" (101 Ohio App. 459, 462-464, 131 N. E. (2d) 662). The Court of Appeals concluded that since the state court had authority over a phase of the controversy, the previous dismissal was improper and the injunction, as it originally issued, should be reinstated (101 Ohio App. 465).

On the trial for a permanent injunction the trial court found "that the [peaceful] picketing complained of represented an unlawful plan or conspiracy against Richman contrary to the picketing policy of Ohio and issued an injunction prohibiting *all (sic)* picketing of the Richman stores". (Pet., Appendix "B", p. 23). It therefore barred the peaceful picketing as well as the "special sporadic picketing demonstrations".

Upon review, the Court of Appeals, again construing the "special sporadic picketing demonstrations" as "mass picketing" concluded that it had authority to issue an injunction limited to that phase of the ac-

tivity (R. 32, 34-35). As to the phases of the picketing concluded to be peaceful, however, it held (R. 34):

> "(1) A State court is without jurisdiction to enjoin the picketing by a labor union, in a dispute with an employer, engaging in interstate commerce, over the unionization of the employer's non-union employees, where the union pickets the business locations of such employer in an orderly and peaceful manner and the controversy is related to an unfair labor practice that comes within the purview of the Labor-Management Relations Act for the reason that the employer must initially, at least, pursue its remedy before the National Labor Relations Board. [Citing decisions of this Court and the Supreme Court of Ohio]"

Accordingly, the court issued an injunction limited to the "special sporadic picketing demonstrations".

On review by the Supreme Court of Ohio, the judgment of the Court of Appeals was affirmed.[2] The Supreme Court of Ohio, setting forth at length this Court's opinion in *Hotel Employees Union, Local No. 255* v. *Sax Enterprises*, 3 L. Ed. 2d 289, 79 S. Ct. 273, concluded (R. 25; 168 O. S. 560, 563):

> "In many conflicts between labor and management where interstate commerce is involved, as is the case here, the National Labor Relations Act asserts itself and is applied to the exclusion of interference by the State courts. This is so with respect to the peaceful picketing of an em-

[2] Amalgamated did not appeal from the holding of the Court of Appeals regarding the "picketing demonstrations".

ployer's premises by labor unions and their members to force the employer to accede to the union's demands and to bring about the unionization of those who work for the employer."

In sum, the Supreme Court of Ohio, as had the Court of Appeals previously, concluded, as Richman had alleged, that the Amalgamated's peaceful picketing was engaged in for the purpose of causing Richman to force its employees to become members of Amalgamated, but that such activity was exclusively within the purview of the National Labor Relations Board and therefore beyond state court regulation or restraint.

Argument

Respondents submit that the court below properly delineated state court jurisdiction in accordance with the preemption postulates uniformly enunciated by this Court. *Garner* v. *Teamsters, etc. Union*, 346 U. S. 485; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468; *Hotel Employees Union, Local No. 255* v. *Sax Enterprises*, 79 S. Ct. 273; *San Diego Building Trades Council, etc.* v. *Garmon*, 79 S. Ct. 773.

As first stated in *Garner*, Richman "could have presented this grievance to the National Labor Relations Board", and therefore, "the grievance was not subject to litigation in the tribunals of the state" (346 U. S. at 501). This Court there found that the Congressional scheme provided in the National Labor Relations Act envisaged disposition of such matters, at least in the first instance, by the National Labor Relations Board and by no other tribunal. It laid down

the rule that whether the picketing complained of was unlawful, or whether it was of a character which Congress sought to leave free of restraint was a matter beyond court surmise and respecting which the "power and duty of primary decision lies with the Board. . . ." (346 U. S. at 489).[3] See also *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 478. There has been no deviation from this rule.

As most recently stated in *San Diego Building Trades Council, etc.* v. *Garmon*, 79 S. Ct. 773, 779-780:

> "It is not for [the Supreme Court] to decide [how] the National Labor Relations Board would have, or should have, decided these questions. . . . When an activity is arguably subject to Section 7 or Section 8 of the Act the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.
>
> * * * *
>
> . . . and since such activity is arguably within the compass of Section 7 or Section 8 of the Act, the States' jurisdiction is displaced."

On the applicable facts herein presented, it can no longer be properly questioned but that the activity complained of here is arguably an unfair labor practice or a protracted activity.

[3] In *Garner*, this Court was considering the validity of a state court injunction against organizational picketing of the premises of an employer engaged in interstate commerce where the purpose of the picketing—indistinguishable from the purpose alleged by Richman in the instant case and so found by each of the state courts—was to "coerce the petitioners into compelling or influencing their employees to join the union" (346 U. S. at 487).

The activity here involved, however it may be characterized—organizational picketing, recognition picketing, etc.—is conduct closely related to the conduct denominated by the National Labor Relations Board in the line cases beginning with *Curtis Bros., Inc.* as an unfair labor practice.[4] Whether the activity complained of here is a violation 8(b)(1), as held by the Board in *Curtis*, or 8(b)(2), as suggested in *Garner*, or 8(b)(4), as suggested in *Hotel Employees*, is a matter for the National Labor Relations Board to consider and to pass upon in the first instance.

If it is not an unfair labor practice, it may well be, as Amalgamated urged throughout the state court proceedings, that the picketing in the instant case is concerted activity affirmatively protected by the National Labor Relations Act. See 93 Cong. Rec. A3370 (1947); see also *San Diego Building Trades Council, Etc.* v. *Garmon, supra*, at p. 782 (concurring opinion); *Drivers Local Union No. 276* and *Capital Service, Inc.*, 100 N. L. R. B. 1092 (1952).

But whether the activity here is an unfair labor practice or protected activity is first a matter for adjudication or other disposition by the National Labor Relations Board. Only then may there possibly be an area for state court regulation.

---

[4] *Curtis Bros., Inc.*, 119 N. L. R. B. 232, set aside — F. 2d — (C. A. D. C. 1958) [43 L. R. R. M. 2156], cert. granted, *sub nom. National Labor Relations Board* v. *Drivers, Chauffers, Helpers Local Union No. 639, etc.*, 79 S. Ct. 876. In that case the Board concluded that picketing actively by a minority union for the purpose of compelling recognition constituted a violation of Sections 8(b)(1)(A) of the National Labor Relations Act.

The very complexity of the arguments advanced in Richman's petition in support of its request for certiorari points up that the activity complained of is arguably an unfair labor practice or protected activity. Richman's arguments reveal that what it essentially seeks of the courts, state and federal, is that they place themselves in the position of the National Labor Relations Board and pass upon involved questions of law requiring the most sophisticated analysis of the National Labor Relations Act and the decisions thereunder. On facts such as are here involved this Court has repeatedly stated that the courts, federal and state, must "defer to the exclusive competence of the National Labor Relations Board" (*Garmon, supra,* at p. 730).

As the foregoing discussion makes plain, this is not a case, as Richman urges in which the union activity is "governable by the State or it is entirely ungoverned". As *Garmon* plainly states, to reach this conclusion the activity must first be presented to the Board and only then, if the Board decides that the activity is neither protected nor prohibited, is there a question raised as to whether state regulation is foreclosed (*Garner,* at p. 780). Since Richman failed to avail itself of the opportunity to present this matter to the Labor Board, "it is not appropriate to surmise how the National Labor Relations Board might have decided this controversy had [petitioner] presented it to that body" (*Garner, supra,* at p. 489).

The decision of the court below is in full accord with the preemption principles heretofore enunciated by this Court. The State Court's lack of authority is plain. Petitioner has failed to submit any valid reason for the grant of a writ of certiorari.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM J. ISAACSON,
67 Wall Street,
New York 5, New York,
Counsel for Respondents.

SMOOT & REIMER,
THURLOW SMOOT,
2141 Illuminating Building,
Cleveland 13, Ohio,
Of Counsel.